Tuesday, June 26, 2001

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UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF CALIFORNIA

The court held a trial on June 6, 2001 regarding the claim asserted by Natalie Hernandez against the Debtor. David Finkelstein appeared for claimant Hernandez. Richard F. Kelly appeared for Debtor. Upon due consideration, the court hereby issues the following memorandum decision, which shall constitute findings of fact and conclusions of law under Fed. R. Bankr. P. 7052.

INTRODUCTION

Creditor Natalie Hernandez (Hernandez) rented a two-bedroom apartment from Debtor W.D. Johnson, Sr. (Johnson) from April 15, 1999 to March 1, 2001. The apartment was a second unit on the lower floor of Johnson's house. Johnson filed a petition under chapter 13 of the Bankruptcy Code on September 5, 2000. Hernandez has asserted claims against Johnson for sexual harassment, breach of contract, retaliatory eviction, breach of the implied warranty of habitability, and wrongful retention of her security deposit. This court has jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b).

SEXUAL HARASSMENT

I find that approximately three weeks after Hernandez moved into the apartment, she met with Johnson in his apartment to execute a written lease. During that meeting, Johnson placed his hand on Hernandez' knee. She gently brushed it away. Johnson also gave

Hernandez a business card which stated in Spanish "mailman looking for woman friend." Johnson asked Hernandez to give it to any women she knew who might be interested. Several weeks later, when her sister and mother came to visit Hernandez, Johnson made a comment to Hernandez about her sister's buttocks.

Hernandez also testified that Johnson stood outside her door and listened when Hernandez' boyfriend visited her. I credit Hernandez' testimony that Johnson was in the garage adjacent to Hernandez' apartment during some of those visits. I also credit, however, Johnson's testimony that he had legitimate reasons to be on the lower floor. He kept his motorcycle there, and the laundry room was there. On balance, the evidence does not establish that Johnson was deliberately attempting to listen to the activities in Hernandez' apartment.

Civil damages may be imposed on a landlord who sexually harasses a tenant. In order to prevail, the tenant must establish that he or she is unable easily to terminate the relationship, and "The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe." Cal. Civil Code § 51.9.

I determine that Johnson is not liable to Hernandez for sexual harassment. Hernandez did establish that she could not easily terminate the relationship. The evidence suggests that she attempted to find another apartment early in the tenancy, but was unable to do so. Hernandez did not, however, establish that Johnson engaged in conduct constituting actionable sexual harassment. Although Johnson's acts were unreasonable, rude, and unwelcome, they were not sufficiently "pervasive or severe" to form a basis for assessing damages.

RETALIATORY EVICTION

By July 1999, the relationship between Johnson and Hernandez had deteriorated significantly. On July 15th, Hernandez sent Johnson a letter raising several complaints about the apartment and Johnson's conduct. The letter complained that the toilet overflowed, that the refrigerator leaked, that an emergency exit could be opened from the inside only with a key that she did not have, and that Johnson had breached the lease by limiting her use of the washer and dryer. In the same letter, Hernandez also asserted that Johnson had falsely accused her son of damaging the property, and that Johnson had attempted to restrict her from entertaining her friends at the apartment. Hernandez made at least five other written complaints about the condition of the apartment to the Housing Authority and Johnson by the end of October 1999.

In November 1999, the Housing Authority, which paid the bulk of the rent under Section 8 of the Federal Housing Act, increased Hernandez' share of the rent from $50 to $287. When Hernandez did not timely pay her share of the November rent, Johnson initiated an unlawful detainer action. By the end of November, Hernandez persuaded the Housing Authority to reduce her share of the rent to $50, retroactive to November 1st. She provided Johnson prompt notice of this change, and the November rent was paid before the unlawful detainer action went to trial on December 21, 1999. The court ruled in favor of Hernandez in the

unlawful detainer action on January 18, 2000.

The initial term of the lease expired on April 30, 2000. The lease provided that the lease could be terminated by the landlord at that time only if he gave 90 days notice and only for cause. On January 30, 2000, Johnson gave written notice of his intent to terminate the lease effective April 30th, but the notice did not specify any cause justifying the termination. When Hernandez failed to vacate, Johnson initiated a second unlawful detainer action. The court denied relief on June 20th, ruling that the notice was invalid, because it failed to specify cause for the termination.

Sometime in the Spring of 2000, Hernandez complained to the Daly City Building Department about the condition of the apartment. The Building Department conducted an inspection of the property, and wrote to Johnson on June 12th, stating that the apartment constituted an illegal second unit.

On June 27, 2000, shortly after he received the Building Department letter, Johnson gave Hernandez a 30-day notice to quit. This notice asserted that cause existed to terminate the lease because Hernandez: (i) had repeatedly disturbed the neighbors and damaged the property; (ii) had repeatedly violated the lease terms by paying rent late; and (iii) had allowed the unit to be used by other persons. Johnson did not file an unlawful detainer action when Hernandez did not vacate the premises upon the expiration of the notice. Although Hernandez ceased paying rent in July 2000, Johnson took no further action to remove her. Hernandez vacated the apartment on March 1, 2001.

Section 1942.5 of the California Civil Code provides in relevant part:

(c) It shall be unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of such acts, for the purpose of retaliating against the lessee because he or she has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights under the law. In an action brought by or against the lessee pursuant to this subdivision, the lessee shall bear the burden of producing evidence that the lessor's conduct was, in fact, retaliatory.

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(f) Any lessor or agent of a lessor who violates this section shall be liable to the lessee in a civil action for all of the following:

(1) The actual damages sustained by the lessee.

(2) Punitive damages in an amount of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each retaliatory act where the lessor or agent has been guilty of fraud, oppression, or malice with respect to such act.

I determine that Johnson violated section 1942.5 on three occasions.

Johnson first engaged in retaliatory eviction in bringing the first unlawful detainer action to trial in December 1999. Johnson was justified in filing the unlawful detainer complaint, because Hernandez had not timely paid her share of the November rent. Before the action went to trial, however, the Housing Authority had retroactively adjusted her share of the rent and the full rent had been paid. It thus appears that Johnson persisted in prosecuting the action not to enforce the terms of the lease, but in retaliation for the numerous complaints Hernandez had made about the condition of the apartment. I further find that Johnson acted with oppression with respect to this act, and that punitive damages of $1,000 are appropriate. Hernandez did not establish the actual damages she suffered as a result of this act.

Johnson also engaged in retaliatory eviction in attempting to terminate the lease at the end of the initial one-year term. As noted by the state trial court, the lease was subject to termination only for cause, and Johnson did not establish cause. The evidence suggests that this attempt to terminate the lease was motivated by Johnson's desire to get rid of a tenant who had repeatedly complained about the condition of the apartment. I determine, however, that Johnson is not guilty of fraud, oppression, or malice with respect to this act. The written lease terms regarding termination are complex, Johnson was not represented by an attorney and, as a result, I believe Johnson subjectively believed that he was not required to extend the lease beyond its initial term. Thus, he did not consciously pursue an oppressive course of action, as he did with the initial unlawful detainer action. Hernandez established actual damages totalling $3,872, consisting of attorneys fees and costs she incurred in defending the second unlawful detainer action.

The final instance of retaliatory eviction was Johnson's issuance of a notice to quit in June 2000. I find that there was no factual basis for the allegations against Hernandez contained in the notice. Because the notice to quit came quickly on the heels of the letter from the Building Department, I find that the notice was issued in retaliation for Hernandez' complaint to that agency. I find that Johnson acted with oppression with respect to this act, and that punitive damages of $1,000 are appropriate. Once again, Hernandez did not establish the amount of actual damages she suffered.

As the prevailing party in the retaliatory eviction claim, Hernandez is entitled to recover reasonable attorneys fees incurred in prosecuting that claim. Cal. Civil Code § 1942.5(g). Hernandez shall segregate the fees incurred in the retaliatory eviction claim from those incurred on her other claims and shall file and serve a motion for allowance of fees in the time and manner prescribed in Civil Local Rule 54-5 of the Local Rules of the United States District Court for the Northern District of California. Johnson's response to the motion shall be filed within fourteen days after service of the motion. The court will conduct a hearing regarding the motion on August 10, 2001 at 9:30 a.m.

BREACH OF CONTRACT RE LAUNDRY FACILITIES

Hernandez testified that when she and Johnson agreed upon the terms of the lease, Johnson stated orally that Hernandez would be entitled to use the washer and dryer. Johnson testified that he made no such representation. The written lease, executed three weeks after Hernandez moved into the apartment, does not mention the washer or dryer one way or the

other. The lease provides in relevant part:

UTILITIES AND APPLIANCES: The owner and the tenant agree to provide and pay for the following appliances and utilities.

Utility Owner Tenant Utility Owner Tenant Appliance Owner Tenant

Garbage X _____ Heat X _____ Range X _____

(Gas)(Elec.)

Hot Water X _____ Light X _____ Refrigerator X _____

Cold Water X _____ Cooking X _____ Other _____ _____ _____

(Gas)(Elec.)

The tenant must pay for any utilities and provide any appliances that the owner is not required to pay for or provided under the lease.

It is undisputed that Johnson allowed Hernandez to use the laundry facilities only one day a week between the hours of 9:00 a.m. and 4:30 p.m.

I find that Johnson did agree that Hernandez would have use of the laundry facilities, and that the restrictions he imposed on Hernandez' use constituted a breach of that premise. I further find that the written lease is ambiguous regarding use of the laundry facilities, that Johnson's oral promise to allow Hernandez to use the laundry is not inconsistent with the written lease, and therefore that enforcement of Johnson's oral promise does not violate the parole evidence rule. The only damages from this breach are the inconvenience of arranging to do all laundry one day a week, or the cost and inconvenience of having someone else do the laundry. Although it is difficult to value such inconvenience, I determine that a reasonable estimate is $20 per week. Over the 102 weeks Hernandez resided in the apartment, such damages total $2,040.[(1)]

HABITABILITY

Hernandez contends that the apartment was maintained in such poor condition and exhibited such extensive housing code violations that it breached the implied warranty of habitability. See Green v. Superior Court, 10 Cal. 3d 616 (1974). Hernandez asserts she is therefore entitled to recover damages and was excused from paying rent.

Hernandez testified to five defects in the habitability of the property. The toilet overflowed until it was replaced in September 1999. The refrigerator failed to work properly until it was repaired in September 1999. Johnson turned off the heat in the fall and early winter 1999-2000. There was a bad smell in one room that apparently resulted when a small animal died inside a sheetrock-covered wall. Finally, the Daly City Building Department sent a letter to

Johnson on June 12, 2000 stating that the apartment violated the local building code in the following respects: (1) construction had been performed without a permit; (2) abit was improper to maintain a second unit in the house under the applicable zoning laws; (3) abthe unit did not contain a proper entry alcove; (4) abthe door between the unit was too thin and did not contain an automatic closing device and weatherstripping; (5) abthe handrail on the stairway must be extended; (6) abparking space was insufficient; (7) abthe clothes dryer was not properly vented; (8) abthe electrical outlets in the bathroom must be equipped with a ground fault interrupter; (9) abone of the bedrooms needed a window; (10) abthe bedrooms needed smoke detectors; and (11) ablarger air intakes were needed in the spaces in which the hot water heater and furnace were located.

I find that the defects in the property were not as serious as Hernandez' testimony portrayed. I find that the toilet overflowed only intermittently, and was replaced in September 1999. I find that the refrigerator functioned adequately at all times. I find that Johnson did not turn off the heat in Hernandez' apartment at any time. Both apartments were controlled by a single thermostat. While this thermostat may have been set at a temperature somewhat below what Hernandez may have preferred, it was never set at an unreasonably low level. Johnson did not dispute the existence of the code violations noted in the Building Department letter.

While California courts have pioneered in recognizing the implied warranty of habitability, they have narrowly defined that doctrine to encompass only certain limited requirements. A leading treatise states:

The measure of the landlord's duty to repairs is determined by the "bare living requirements" in a civilized society. This means that the level of maintenance must be something more than mere survival, since the mere fact that the tenant has inhabited the premises means that he has been able to survive. On the other hand, the landlord is not required to retain the aesthetic conditions in the premises that may be necessary for comfort and enjoyment but not essential for the health and safety of the tenant.

H. Miller & M. Starr, The Law of California Real Estate, Vol. 6 § 18:103 at 264 (2d ed. 1989). Accord Penner v Falk, 153 Cal. App. 3d 858, 867-70 (1984). Similarly, not every housing code violation constitutes a breach of warranty. "Minor housing code violations standing alone which do not affect habitability must be considered de minimis and will not entitle the tenant to reduction in rent . . . ." Hinson v. Delis, 26 Cal. App. 3d 62, 70 (1972).

The California Supreme Court stated that the statutory definition of "tenantability" set forth in section 1941.1 of the Civil Code is relevant in determining whether a landlord has satisfied the implied warranty of habitability. Green, 10 Cal. 3d at 638 n.23. Section 1941.1 provides:

A dwelling shall be deemed untenantable for pur-poses of Section 1941 if it substantially lacks any of the following affirmative standard characteristics:

(a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
(b) Plumbing or gas facilities which conformed to applicable law in effect at the time of

installation, maintained in good working order.

(c) A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.

(d) Heating facilities which conformed with applicable law at the time of installation, maintained in good working order.

(e) Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order.

(f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.

(g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appro-priate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control.

(h) Floors, stairways, and railings maintained in good repair.

Judged against this standard, Johnson did not breach the implied warranty of habitability. There was no material deficiency regarding the heat, refrigerator, and toilet. The smell in the wall was only an aesthetic annoyance. While some of the code violations cited in the Building Department letter relate in some way to health and safety concerns, those violations were not substantial and did not pose any immediate danger to the tenant. The primary concern identified in the Building Department letter is that the apartment violated local restrictions on second units, which restrictions are aimed at parking and density concerns rather than health and safety issues. The Housing Authority inspected the apartment twice during Hernandez' tenancy and did not note any defects.

RETURN OF SECURITY DEPOSIT

Hernandez contends that Johnson improperly failed to return her security deposit. Johnson contends that Hernandez failed to pay rent for the last ten months she lived in the apartment, and that he is entitled to offset that claim against the security deposit. It is undisputed that Hernandez paid Johnson a $1,600 security deposit and that Johnson did not return any of it. It is also undisputed that Johnson failed to provide Hernandez a written statement specifying the reasons for retaining the deposit. Johnson testified that Hernandez failed to pay rent after April 2000. Hernandez acknowledged that she failed to pay rent after

June 2000, but testified she did pay rent for May and June. I credit Hernandez' testimony regarding this issue.

Regarding residential leases, California law provides that within three weeks after the tenant has vacated the premises, the landlord must either return the security deposit or provide the tenant a written accounting regarding any amounts withheld. A landlord who retains a deposit in bad faith is subject to statutory damages. Civil Code § 1950.5. The California Supreme Court has held, however, that a landlord who in good faith fails either to return the deposit or provide an accounting is not precluded from asserting any claim for unpaid rent as a setoff in an action by the tenant for return of the deposit. Granberry v. Islay Investments, 9 Cal. 4th 738, 745 (1995), cert. denied, 516 U.S. 866 (1995). The decision does not define what "good faith" means in this context. I conclude good faith exists, inter alia, where the landlord has an objective, good faith basis to assert a claim for unpaid rent that exceeds the amount of the deposit. The landlord bears the burden of proof regarding both good faith and the validity of the offset claim.

I determine that Johnson acted in good faith and that Hernandez' claim for return of the security deposit is completely offset by Johnson's claim for unpaid rent. It is undisputed that Hernandez did not pay her $387 share of the rent for the last eight months of her tenancy. This amount exceeds the $1,600 deposit. She contends she was not required to do so because Johnson breached the implied warranty of habitability. For the reasons noted in Part D, supra, I find there was no breach of warranty. Consequently, Hernandez is not entitled to recover any part of the security deposit or recover statutory damages for Johnson's failure to provide an accounting. Johnson did not assert any affirmative claim for recovery of the unpaid rent or seek to assert any setoff rights against the claim for retaliatory eviction.

CONCLUSION

Hernandez has an allowed unsecured claim in the amount of $7,912, plus costs of suit, plus those attorneys fees subsequently awarded regarding the retaliatory eviction claim.

Dated: June 22, 2001 _____ Thomas E. Carlson United States Bankruptcy Judge

1. It does not appear that Johnson's restriction of Hernandez' use of the laundry was instituted in retaliation for Hernandez' complaints about the condition of the apartment. See Civil Code § 1942.5(c). The evidence indicates that Johnson instituted the restrictions before Hernandez made any compl

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